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## **VIA ELECTRONIC FILING**

Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554

Re: Project Concord, Inc. v. NBCUniversal Media, LLC (AAA Case No. 72-472-E-01147-11)

MB Docket No. 10-56

Dear Ms. Dortch:

This letter responds on behalf of NBCUniversal Media, LLC ("NBCUniversal") to Public Knowledge's August 24, 2012 letter concerning the Benchmark arbitration between Project Concord, Inc. ("PCI") and NBCUniversal. Public Knowledge was not a party to the arbitration and concedes that it "does not have access to the confidential information in PCI's or NBCUniversal's filings and so cannot review the matter completely." Nonetheless, without knowing all of the facts, Public Knowledge urges "as a general matter" that the Commission should not "disturb the arbitrator's findings" and should assure that cost-shifting will be available to "parties that are victorious in arbitration." Otherwise, it contends, "future parties might be discouraged from filing complaints."

These assertions are misguided and add nothing of substance to the arbitration issues under review by the Commission. Public Knowledge's suggestion that arbitration awards should be summarily affirmed is directly at odds with the *de novo* review authority that the Commission reserved in the *Comcast-NBCUniversal Order*. The Commission retained this broad review authority to ensure that an arbitrator's findings comport both with NBCUniversal's obligations under this federally-imposed compulsory licensing regime and with the rights and interests of other NBCUniversal licensees. As

Cf. In re Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network, Order, 22 FCC Rcd 17938 ¶ 4, n.13 (2007) (distinguishing the Commission's broad *de novo* review of awards issued under its delegated arbitration conditions from the "very narrow grounds" for review of private arbitration awards under the Federal Arbitration Act).

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shown in NBCUniversal's Petition, the Arbitrator here misread fundamental aspects of the *Order* and disregarded (rather than protected) the rights of other NBCUniversal licensees. The Commission has not only the right but a duty to "disturb" these erroneous findings.

Public Knowledge's suggestion that the Commission should adopt a prevailing-party standard for cost-shifting is equally unfounded. The Commission already considered this issue during the merger review and determined that costs should only be awarded where a party's conduct in the arbitration is unreasonable. The Arbitrator flatly rejected PCI's claims that NBCUniversal did anything unreasonable here. Public Knowledge does not acknowledge, much less address, the unreasonable conduct standard adopted by the Commission or the Arbitrator's findings on this issue. Instead, like PCI, Public Knowledge is simply asking the Commission to rewrite the standard for cost-shifting after-the-fact. That would be unlawful and, in all events, unjustified. The unreasonable conduct standard is both appropriate and consistent with the Commission's past practice and precedent.

Finally, besides being unfounded, Public Knowledge's suggestions reflect a fundamental misunderstanding of this dispute. The present arbitration was not about ensuring PCI's "access" to NBCUniversal programming, as Public Knowledge wrongly assumes. Instead, it centered on whether providing certain content to PCI would exceed NBCUniversal's obligations under the *Order* or breach other NBCUniversal license agreements. And as a result of the arbitration, PCI submitted a final offer that significantly narrowed these issues. Had PCI offered similar terms from the start, the arbitration could have been avoided. Indeed, the record showed that NBCUniversal has reached dozens of negotiated license agreements with online video distributors ("OVDs"), without arbitration. If Public Knowledge seeks to champion online video and help eliminate unnecessary arbitrations under the *Order*, it should advocate that OVDs invoking the Benchmark Condition be forthcoming at the negotiating table about a peer deal and the terms and conditions that fairly reflect (rather than attempt to exceed) their rights and NBCUniversal's obligations.

Respectfully submitted,

/s/ David P. Murray

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Counsel for NBCUniversal Media, LLC

## **CERTIFICATE OF SERVICE**

I, Michael D. Hurwitz, hereby certify that on August 31, 2012, I caused true and correct copies of the enclosed Letter to be served via email to the following:

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/s/ Michael D. Hurwitz

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